No. 84-1258 (5)

Office-Supreme Court, U.S.
FILED
FEB 27 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

—v.—

PUBLIC UTILITY DISTRICT NO. 1 OF
BENTON COUNTY, WASHINGTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE CITY OF SEATTLE, WASHINGTON AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

DOUGLAS N. JEWETT
SEATTLE CITY ATTORNEY
Seattle Municipal Building
Seattle, Washington 98104
(206) 625-2402
City Attorney and Counsel
For Amicus Curiae
City of Seattle, Washington

CAMDEN M. HALL*
STELLMAN K. KEEHNEL
FOSTER, PEPPER & RIVIERA
34th Floor
1111 Third Avenue Building
Seattle, Washington 98101
(206) 447-4400
Counsel for Amicus Curiae
City of Seattle, Washington

ELLEN DONOVAN
Suite 1855
1111 Third Avenue Building
Seattle, Washington 98101
(206) 447-4400
Of Counsel for Amicus Curiae
City of Seattle, Washington

**Counsel of Record*

February 25, 1985

FRAYN PRINTING, SEATTLE, WASHINGTON

20/42

No. 84-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

—v.—

PUBLIC UTILITY DISTRICT NO. 1 OF
BENTON COUNTY, WASHINGTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE CITY OF SEATTLE, WASHINGTON AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

DOUGLAS N. JEWETT
SEATTLE CITY ATTORNEY
Seattle Municipal Building
Seattle, Washington 98104
(206) 625-2402
City Attorney and Counsel
For Amicus Curiae
City of Seattle, Washington

CAMDEN M. HALL*
STELLMAN K. KEEHNEL
FOSTER, PEPPER & RIVIERA
34th Floor
1111 Third Avenue Building
Seattle, Washington 98101
(206) 447-4400
Counsel for Amicus Curiae
City of Seattle, Washington

ELLEN DONOVAN
Suite 1855
1111 Third Avenue Building
Seattle, Washington 98101
(206) 447-4400
Of Counsel for Amicus Curiae
City of Seattle, Washington

**Counsel of Record*

February 25, 1985

TABLE OF CONTENTS

		PAGE
I.	Interest of Amicus Curiae	1
II.	Statement of Case	4
III.	Summary of Argument	7
IV.	Argument	7
	A. Special and Important Reasons Exist for Review of this Case	7
	B. *Chemical Bank I* and *II* Violate the Taking Clause and the Due Process Clause	9
	1. Allowing the Utilities to Avoid Their Contractual Obligations Results in an Unconstitutional Taking	9
	2. Making Factual Determinations Without an Evidentiary Hearing Violates the Due Process Clause	11
V.	Conclusion	13

TABLE OF AUTHORITIES

PAGE

Cases

Chemical Bank v. Public Utility District No. 1 of Benton County, et al., Civil Action No. C83-1080 (W.D. Wash., filed Aug. 3, 1983) 2

Chemical Bank v. Washington Public Power Supply System, 99 Wash.2d 772, 666 P.2d 329 (1983), *petition for cert. filed*, ___ U.S.L.W.___ (U.S. Feb. 4, 1985) (No. 84-1258) ..... *passim*

Chemical Bank v. Washington Public Power Supply System, 102 Wash.2d 874, 691 P.2d 524 (1984), *petition for cert. filed*, ___ U.S.L.W.___ (U.S. Feb. 4, 1985) (No. 84-1258) ..... *passim*

In re Washington Public Power Supply System Litigation, M.D.L. No. 551 (W.D. Wash., transfer order filed Aug. 5, 1983) 2

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 7, 13

Ruckelshaus v. Monsanto Co., 104 S.Ct. 2862 (1984) . 9

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 7, 9

Constitutional Provisions

U.S. Const. amend. V, cl.4 ..... 7,8,9 10,11,14

U.S. Const. amend. XIV, §1, cl.4 ..... 7,8,9 13,14

Statutes

1959 Wash. Laws, ch. 218, §8 4

PAGE

Other Authorities

Comment, *Chemical Bank v. WPPSS: A Case of Judicial Meltdown,* 5 J. Energy L. & Pol'y 273 (1984) 2, 7

Deposition of Edward E. Coates, Vol. I 12

Deposition of Donald DeFreese, Vol. I 12

Deposition of Robert McKinney, Vol. III 12

Report, Washington State Senate Energy and Utilities Committee WPPSS Inquiry: Causes of Cost Overruns and Schedule Delays on the Five WPPSS Nuclear Power Plants, January 12, 1981, Vol. I. 6

Seattle Post-Intelligencer, October 7, 1983, at A7, col. 6 7

Seattle Times, June 16, 1983, at B4, col. 2 7

Seattle Times, June 19, 1983, at D10, col. 3 7

Sup. Ct. R. 17.1(c) 8

Sup. Ct. R. 36.4 1

I. INTEREST OF AMICUS CURIAE[1]

The City of Seattle has the largest population of any city in the Northwest. Seattle's municipal lighting department, Seattle City Light, is the seventh largest public utility in the nation. Seattle supports the certiorari petition because (1) Seattle has suffered, and continues to suffer, substantial economic injury as a direct consequence of the Washington Supreme Court's ruling that certain public utilities are excused from their contractual obligation to repay billions of dollars to bondholders and (2) the uncompensated taking consummated by the Washington Supreme Court's ruling has undermined, and will continue to undermine, the ability of many local government agencies, including Seattle, to raise needed funds in the national bond market.

In 1976, 93 Northwest utilities, including Seattle, entered into an option to purchase a percentage of the anticipated output of Washington Public Power Supply System ("Supply System" or "WPPSS") Nuclear Projects 4 and 5 ("Projects 4 and 5").[2] Eighty-eight of these utilities (but not Seattle) exercised their options and agreed to pay for the construction of Projects 4 and 5. The 88 utilities (but not Seattle) signed a Participants' Agreement obligating themselves to make repayments necessary to service the bonds (*i.e.*, repay the principal and pay the interest) issued to construct Projects 4 and 5—even if the plants were not "completed, operable or operating."[3] Construction of the plants was suspended in May 1981 and terminated in January 1982. The plants will not be completed.

In 1976, after lengthy study and debate, Seattle decided not to exercise its option to participate in Projects 4 and 5. Instead, Seattle elected to satisfy its power requirements through alternate sources, including both conservation and other generating

---

1. The City of Seattle files this Brief of Amicus Curiae pursuant to Sup. Ct. R. 36.4.

2. The Supply System is a joint operating agency of the State of Washington which coordinated the financing and construction of Projects 4 and 5 for the benefit and under the supervision of the participants in Projects 4 and 5.

3. Washington Public Power Supply System Nuclear Projects 4 and 5 Participants' Agreement, at 19.

resources. Since 1976, Seattle has spent $86.6 million to pursue these alternatives. In addition, Seattle has committed to pay approximately $1.6 billion for other electrical energy projects. These costs will be paid by Seattle City Light's ratepayers.

In 1983 and 1984, through two decisions decried as "our judiciary at its worst," Comment, *Chemical Bank v. WPPSS: A Case of Judicial Meltdown*, 5 J. Energy L. & Pol'y 273, 298 (1984), the Washington Supreme Court effectively relieved the 88 Northwest utilities from their obligation under the Participants' Agreement to pay the principal and interest on the bonds which had been issued for the construction of Projects 4 and 5. *Chemical Bank v. Washington Public Power Supply System*, 99 Wash.2d 772, 666 P.2d 329 (1983) ("*Chemical Bank I*"), and *Chemical Bank v. Washington Public Power Supply System*, 102 Wash.2d 874, 691 P.2d 524 (1984) ("*Chemical Bank II*"), *petition for cert. filed*, __U.S.L.W.__ (U.S. Feb. 4, 1985) (No. 84-1258).

Seattle has always honored its bond obligations. Seattle expressly decided *not* to participate in Projects 4 and 5, and it decided *not* to assume any financial obligations with respect to Projects 4 and 5. The irony is that despite these decisions, Seattle may now be required to pay costs of the uncompleted Projects 4 and 5, while some or all of the 88 participating utilities may succeed in avoiding their clear obligations. This is because Seattle is one of many defendants in a multi-billion dollar securities fraud lawsuit spawned by the surprising results of *Chemical Bank I*. The securities fraud lawsuit[4] was brought by bondholders to force the defendant utilities to honor their written agreement to provide the funds necessary to service the Project 4 and 5 bonds. Seattle is named as a defendant because Seattle is a member of the Supply System and because an employee of Seattle City Light sat on the Supply System's Board of Directors and Executive Committee.

Although Seattle is only one of many defendants in the securities lawsuit, Seattle's size and assets render it a prime

---

4. *In re Washington Public Power Supply System*, M.D.L. No. 551 (W.D. Wash., transfer order filed Aug. 5, 1983); *Chemical Bank v. Public Utility District No. 1 of Benton County, et al.*, Civil Action No. C83-1080 (W.D. Wash., filed Aug. 3, 1983).

target if the bondholders prevail. Consequently, Seattle is unfairly exposed to risk in the securities fraud lawsuit, despite Seattle's deliberate decision in 1976 not to participate in Projects 4 and 5.

The three dissenting justices in *Chemical Bank II* lament that the litigation resulting from the majority's decision to relieve the participants from their obligations may expose the "entire populace of the state" to liability, "including those areas that specifically rejected participation." 102 Wash.2d at 914, 691 P.2d at 546. Seattle, which specifically rejected participation, is more severely prejudiced than the rest of the public utility defendants. Unlike many other municipalities and public utility districts in Washington, Seattle rejected participation in Projects 4 and 5 and then paid, and committed to pay, hundreds of millions of dollars to satisfy its perceived energy needs. The securities fraud lawsuit, when combined with the *Chemical Bank* rulings, raises the spectre of Seattle paying *twice* for its decision not to participate in Projects 4 and 5, while the actual participants in Projects 4 and 5 may pay nothing.

The financial impact of *Chemical Bank I* and *II* is felt in several additional ways. Seattle is forced to spend unprecedented millions of dollars in legal fees to defend itself in the securities fraud lawsuit and related actions. Seattle has experienced difficulty in obtaining required errors and omissions insurance and may have to pay increased insurance premiums as a result of the *Chemical Bank* decisions. An even more significant and prolonged harm to Northwest utilities and all local government agencies arising from *Chemical Bank I* and *II* is the lowered bond rating and "WPPSS penalty" applied by the financial community to long-term bond issues. For example, since *Chemical Bank I* Seattle has paid, and may be compelled to pay in the future, a "WPPSS penalty" of added interest on municipal bonds. This penalty threatens all local government entities in the Northwest, regardless of their participation in Projects 4 and 5, because *Chemical Bank I* and *II* establish that, at least in the state of Washington, government agencies may be allowed by the courts to renege with impunity on their bond obligations.

The long-term negative effects of *Chemical Bank I* and *II*, if those decisions are allowed to escape scrutiny by this Court, are incalculable. As an urban leader in the Northwest, as a government agency dependent upon access to the national bond market, and as a national leader among public utilities, Seattle is convinced that *Chemical Bank I* and *II*, unless reversed by this Court, portend widespread economic dislocation for the Northwest, higher interest costs for state and local governments, impaired access to the bond market for some government agencies and disaster for the institution of public power.

II. STATEMENT OF CASE

In the Participants' Agreement, the 88 utilities promised to repay the costs of constructing Projects 4 and 5 whether or not the nuclear plants were ever "completed, operating or operable." This unconditional promise was repeated in the Official Statements issued in conjunction with each of the 14 bond offerings for Projects 4 and 5.[5]

This firm commitment was supported by legal opinions, provided by attorneys for each of the 88 utilities and by independent bond counsel, which stated that the utilities had authority to enter into the Participants' Agreement. The obligation of the 88 utilities was also endorsed by the Washington State Auditor. The State Auditor certified and registered every bond issued for Projects 4 and 5;[6] the State Auditor's certification appeared on

---

5. The Official Statements for the Project 4 and 5 bond offerings each included language similar or identical to the following:

> Each Participant is obligated to pay the Supply System its share of the annual total cost of the Projects, including debt service on the Bonds and the required annual payments to the reserve funds described below, *whether or not the Projects are operable or operating and notwithstanding the suspension, reduction or curtailment of the Projects' output.*

Official Statement for Project 4 and 5 Generating Facilities Revenue Bonds, Series 1977A, March 1, 1977, at 1 (emphasis added).

6. The certification and registration were required by 1959 Wash. Laws, ch. 218, § 8.

the face of every bond;[7] and the State Auditor's certification followed his determination that "the Constitution and laws of the state . . . have been properly complied with. . . ."[8]

In short, as even the majority in *Chemical Bank II* admitted, "all parties assumed that statutory authority existed" for the utilities to enter into the Participants' Agreement. *Chemical Bank II*, 102 Wash.2d at 899, 691 P.2d at 538. Seattle, while not a party to the *Chemical Bank* litigation, also "assumed that statutory authority existed" and relied upon the repeated representations of this authority in its dealings with the Supply System.

However, the Washington Supreme Court, in a total departure from its earlier decisions on municipal law, found that the Washington utility participants in Projects 4 and 5 had exceeded their authority under Washington statutes and that their entry into the Participants' Agreement was *ultra vires*. *Chemical Bank I*, 99 Wash.2d at 799, 666 P.2d at 343; *Chemical Bank II*, 102 Wash.2d at 896, 691 P.2d at 537. The Washington Supreme Court disregarded the fact that the same Washington legislature which created the purported statutory limit on the utilities'

---

7. The certification reads:

STATE AUDITOR'S CERTIFICATE OF REGISTRATION

STATE OF WASHINGTON)
) ss.
OFFICE OF THE STATE AUDITOR)

I DO HEREBY CERTIFY that I have examined the within Bond and certified copies of the resolutions authorizing the issuance thereof, and such additional information with respect thereto as is required by me, and that the within Bond has been registered in my office in accordance with the provisions of Section 54.24.070 of the Revised Code of Washington.

WITNESS my hand and seal of office this _____ day of _____, 19____.

s/ Robert Graham
Auditor of the State of Washington

By _____

s/ _____
Deputy State Auditor

8. Statement of the State Auditor included in the annual reports of the Supply System from 1976 through 1980.

authority had for years exercised control and a critical oversight role over the Supply System and the construction of Projects 4 and 5 without once questioning the utilities' authority to contract for and construct Projects 4 and 5.[9]

This case does not simply involve a state law question as to the propriety of the *ultra vires* holding by the Washington Supreme Court. Important federal rights are at stake. The Washington Supreme Court refused all equitable claims raised on behalf of the bondholders and summarily rejected the bondholders' argument that property had been taken without compensation and without due process of law. *Chemical Bank II*, 102 Wash.2d at 912, 691 P.2d at 545-46. The Washington Supreme Court's treatment of the federal constitutional claims is reviewable by this Court and, in the interest of municipalities such as Seattle, should be reviewed by this Court.

---

9. For example, the 1981 Washington State Senate Energy and Utilities Committee WPPSS Inquiry report described the participants' unequivocal commitment to service the bonds as "secure financial arrangements" and further stated:

> "Hell or High Water" Clauses
>
> As their name implies, the revenue bonds *will be repaid* with revenues raised by the participating utilities from the sale of electricity. For example, bonds for WNP-4 and WNP-5 *are backed by agreements by the participating utilities with WPPSS by which they covenant* to "establish, maintain and collect rates or charges for power. . . which shall be adequate to provide revenues sufficient to fulfill their obligation to [WPPSS]". These *covenants apply "whether or not the projects are operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the projects' output".* These *open-ended commitments* are characterized by the financial community as "hell or high water" clauses *because they are obligations for repayment in all events.* "Hell or high water" arrangements rely on the participants' ability to sell electricity at whatever price from sources other than the plants under construction *to pay for their share of the construction of those facilities whether or not any or all of them are ever completed or operating. . . .*
>
> The Committee notes that all bonds that have been issued *must be repaid without regard to whatever ultimate success WPPSS may have in completing or operating any of the projects. . . .*

Report, Washington State Senate Energy and Utilities Committee WPPSS Inquiry: Causes of Cost Overruns and Schedule Delays On the Five WPPSS Nuclear Power Plants, January 12, 1981, Vol. I, at 52-53 (emphasis added).

III. SUMMARY OF ARGUMENT

Seattle respectfully urges this Court to review *Chemical Bank I* and *II* because those decisions directly conflict with this Court's interpretation of the Taking Clause and the Due Process Clause and because of the effect of those decisions on the ability of Seattle and other local government agencies to raise needed funds in the national bond market.

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980), holds that a government entity cannot, by *ipse dixit*, convert private property into public property and refuse to compensate that taking. The Washington Supreme Court, by departing from its prior decisions and excusing the participant utilities before it from their contractual obligations, achieves the exact result forbidden by *Webb's*.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950), instructs that the Fourteenth Amendment's Due Process Clause guarantees an appropriate hearing before property may be taken by a government agency. The Washington Supreme Court disregarded the Due Process Clause by ruling on hotly contested material factual issues, although no evidentiary hearing was held to determine those material facts.

IV. ARGUMENT

A. Special and Important Reasons Exist For Review of this Case.

Chemical Bank I and *II* had the effect of transferring what may be a $7 billion undertaking from Northwest participants, who had expressly contracted to assume it, to the bondholders, who had been repeatedly assured by the participants that the bondholders would never have to bear the totality of this risk. This yielded a popular perception that *Chemical Bank I* and *II* are politically motivated "home town" decisions.[10]

In part because of the perception of the political character of the decisions, *Chemical Bank I* and *II* have significant national

---

10. *See, e.g.*, Comment, *Chemical Bank v. WPPSS: A Case of Judicial Meltdown*, 5 J. Energy L. & Pol'y 273, 298 (1984); Seattle Times, June 16, 1983, at B4, col. 2; Seattle Times, June 19, 1983, at D10, col. 3; Seattle Post-Intelligencer, October 7, 1983, at A7, col. 6.

implications. They encourage irresponsibility among all public entities eager to renege on politically unattractive debt and contract obligations. *Chemical Bank I* and *II* may prompt similar court challenges across the nation. At the same time, *Chemical Bank I* and *II* impose penalties, in the form of higher bond interest rates, upon responsible public agencies such as Seattle. Consequently, the legacy of *Chemical Bank I* and *II*, if those decisions are permitted to stand, will be a burden on local government units across the nation. This added burden comes at a time when the financial burdens on local government are rising dramatically as a result of the shift of responsibilities from the federal government to lower levels of government. This added burden from *Chemical Bank I* and *II* cannot be afforded by Seattle or other local government units.

The enormous economic implications of *Chemical Bank I* and *II* appear insignificant when contrasted with the constitutional implications of the decisions. The dissenters in *Chemical Bank II* were so appalled by the majority's treatment of the Taking Clause and the Due Process Clause that they specifically encouraged this Court to accept review:

> The majority fails to convincingly deal with the question of how this court can make a finding of fact on disputed evidence contrary to all our previous case law. The appellants will undoubtedly ask for federal review on this ground. In the event they do, the United States Supreme Court should exercise its discretion and accept this case for review. . . .

102 Wash.2d at 914, 691 P.2d at 546.

Chemical Bank I and *II* are so contrary to prior decisions of this Court that this case is singularly appropriate for review under Sup. Ct. R. 17.1(c).[11]

---

11. .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

. . . .

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Sup. Ct. R. 17.1(c).

B. Chemical Bank I and II Violate the Taking Clause and the Due Process Clause.

1. *Allowing the Utilities to Avoid Their Contractual Obligations Results in an Unconstitutional Taking.*

In *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862, 2875 (1984), this Court reiterated three factors to be examined in determining whether an unconstitutional taking has occurred: the economic impact of the governmental action, the presence of a reasonable investment-backed expectation and the character of the governmental action. Each factor points to an unconstitutional taking in this case.

First, the economic impact of the governmental action is real and substantial. The *Chemical Bank* decisions facilitated the largest bond default in the nation's history. *Chemical Bank I* and *II* consummated the shift of what may be a multi-billion dollar loss from the participants to the bondholders. Second, the investment-backed expectations were reasonable in view of the legal opinions of the utilities' attorneys and bond counsel as to the participants' authority, in view of the legislature's knowledge about and acquiescence in the terms of the Participants' Agreement and in view of the State Auditor's representations about the participants' authority.

The third indicator, the character of the governmental action, similarly evidences the unconstitutional taking that occurred. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980), this Court ruled that a government agency—including a state court—cannot, simply by recharacterizing property rights, transform private property into public property:

> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. . . .
>
> To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation. . . . This is the very kind of thing that the

Taking Clause of the Fifth Amendment was meant to prevent.

The recharacterization of property rights in this case was completed when the Washington Supreme Court announced that the participant utilities before it, which until then were obligated to repay the costs of Projects 4 and 5, had no obligation to repay those costs or to make restitution of the money borrowed and spent for their own public purpose.

The Washington Supreme Court reached its conclusion by making four dramatic and retroactive changes in Washington law "by *ipse dixit*." If any one of the four changes had not been made, the Washington Supreme Court would have been forced to order the utilities to honor the obligations they assumed when they signed the Participants' Agreement.

(a) The Washington Supreme Court rejected prior law and chose to interpret strictly and limit severely the powers of Washington municipalities.[12] By ignoring precedent, the Washington Supreme Court was able to conclude that the utilities acted *ultra vires*.

(b) The Washington Supreme Court rejected prior law and ruled that the purported *ultra vires* act was substantively *ultra vires*, rather than procedurally *ultra vires*.[13] By changing the rules governing the substantive/procedural distinction, the Washington Supreme Court was able to conclude that the doctrine of unjust enrichment was inapplicable.

(c) The Washington Supreme Court ruled that a bondholder *must* have sought a declaratory judgment on the authority of the issuer, else he is not entitled to recovery under equitable estoppel or estoppel by recital.[14] By creating this unexpected new requirement, the Washington Supreme Court was able to rationalize its conclusion that estoppel theories were inapplicable.

---

12. *See Chemical Bank II*, 102 Wash.2d at 915-16, 691 P.2d at 547 (Utter, J., dissenting).

13. *See Chemical Bank II*, 102 Wash.2d at 931-34, 691 P.2d at 555-57 (Utter, J., dissenting).

14. *Chemical Bank II*, 102 Wash.2d at 905-06, 691 P.2d at 541-42.

(d) The Washington Supreme Court rejected prior law and ruled that the issue of whether the utilities exercised ownership control over Projects 4 and 5 is an issue of law, rather than an issue of fact.[15] By changing the rules governing the determination of the factual issue of ownership control, the Washington Supreme Court was able to conclude that the utilities acted *ultra vires*.

Certainly a state is entitled to change its laws, either through the legislature or the judiciary. But when, as here, those changes are applied retroactively to convert private property into public property (without any public purpose rationale that will withstand analysis) the state has, by *ipse dixit*, consummated the confiscation of private property. The Taking Clause requires that the confiscation in this case either be rescinded or be fairly compensated.

2. *Making Factual Determinations Without an Evidentiary Hearing Violates the Due Process Clause.*

No trial or evidentiary hearing has been held in this case. *Chemical Bank I* resulted from the appeal of an interlocutory summary judgment order. Similarly, *Chemical Bank II* resulted from a motion for reconsideration and an appeal from a summary judgment order. Although no factual hearing was conducted, the Washington Supreme Court made critical factual determinations on at least three disputed and material matters.

First, the Washington Supreme Court made the factual determination that the benefits of the bond revenues flowed solely to the Supply System, and not to the 88 participating utilities. *Chemical Bank II*, 102 Wash.2d at 911, 691 P.2d at 545. The court had no evidence on this vigorously contested issue.

Second, the Washington Supreme Court found that the utilities' control over Projects 4 and 5 was insufficient to bring the Participants' Agreement within the utilities' statutory authority

---

15. *See Chemical Bank II*, 102 Wash.2d at 931-34, 691 P.2d at 555-57 (Utter, J., dissenting). The control issue is critical because the Washington Supreme Court held in *Chemical Bank I* that if the control exercised by the utilities constituted the equivalent of an ownership interest, then the Participants' Agreement was not *ultra vires*. 99 Wash.2d at 787,666 P.2d at 337.

to construct energy facilities. *Chemical Bank II*, 102 Wash.2d at 893, 691 P.2d at 535. The Washington Supreme Court cites "evidence" of the utilities' insufficient control. *Id.* But the "evidence" was gathered and the factual determination made on this critical issue without the benefit of, or opportunity for, any trial testimony or any proof of the multitude of instances where the utilities exercised control. It was this refusal by the majority to listen to evidence on control that the three dissenters found most distressing. *Chemical Bank II*, 102 Wash.2d at 920-21, 691 P.2d at 550-51 (Utter, J., dissenting).

If the Washington Supreme Court had allowed an evidentiary hearing, the trial record would have included the minutes and transcripts of the Participants' Committee meetings. Those minutes and transcripts disprove the Washington Supreme Court's "findings" that "it seems unlikely that a part-time committee. . . could provide significant input to the management of the projects. . . ." *Chemical Bank I*, 99 Wash.2d at 787, 666 P.2d at 337, and that the "participants' committee apparently served as a rubber stamp for WPPSS' decisions. . . ." 99 Wash.2d at 788, 666 P.2d at 337.[16]

---

16. Indeed, in a deposition of one of the leading members of the Participants' Committee taken in the securities fraud lawsuit on January 23, 1985, Robert McKinney testified the Participants' Committee was required, among other things, to approve: the construction budgets for Projects 4 and 5, the award of any contract or change order in excess of $2,000,000 for Projects 4 and 5, the Fuel Plan for Projects 4 and 5, and the Bond Resolutions for Projects 4 and 5. *See* Deposition of Robert McKinney, Vol. III, at 551-59. Mr. McKinney also denied the Participants' Committee was a "rubber stamp" for the Supply System's decisions. *Id.*, at 560-61. In another deposition of Participants' Committee member Donald DeFreese taken on February 4, 1985, Mr. DeFreese testified as follows:

> Q. Is it your opinion, Mr. DeFreese, that the Participants Committee acted as a rubber stamp for Supply System decisions?
>
> A. I don't know what to say. I never felt we were a rubber stamp committee.

Deposition of Donald DeFreese, Vol. I, at 191. In a third deposition taken on February 11, 1985, Edward E. Coates, who represented the City of Tacoma on the Participants' Committee, testified:

> Q. Now, during your term on the participants committee, Mr. Coates, did you believe that the participants committee was a rubber stamp for the Supply System?
>
> A. No, I don't believe that.

Deposition of Edward E. Coates, Vol. I, at 95.

Further, 20 participants in Projects 4 and 5 were also members of the Supply System. Their acquisition of approximately 70 percent of the output capability of Projects 4 and 5 has been formally identified by the State Auditor as an "equity" interest similar to the interest of a private utility in Projects 4 and 5.[17] This fact is important because the majority in *Chemical Bank II* stressed that the 88 public utilities' lack of sufficient statutory control was proved by "the more complete indicia of ownership and, therefore, control in the agreement between [a private utility] and WPPSS." 102 Wash.2d at 893, 691 P.2d at 535. These represent only a few examples of the detailed proof that could have been placed before the court on the control issue had proper judicial procedures been followed.

Third, the majority in *Chemical Bank II* made the remarkable determination that the bondholders had failed to prove "with clear, cogent and convincing evidence" their entitlement to recovery under equitable estoppel. 102 Wash.2d at 905, 691 P.2d at 542. Without a trial, how could they present such proof?

The requirements of the Due Process Clause of the Fourteenth Amendment were not satisfied. Petitioners were entitled to a hearing appropriate to this case. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). Here, only an *evidentiary* hearing would suffice. Instead, the Washington Supreme Court dispensed with an evidentiary hearing and rendered conclusions on material factual issues without the aid of a factual record.

V. CONCLUSION

The shock waves from the Washington Supreme Court's slamming of the payment windows in *Chemical Bank I* and *II* are reverberating throughout the Northwest and across the nation. Those reverberations will continue to interfere with the orderly management of local government until *Chemical Bank I* and *II* are wiped from the legal landscape.

---

17. April 14, 1981 letter from the Office of the State Auditor to the Chief Accountant/Auditor of Cowlitz County PUD No. 1, at 2.

As long as *Chemical Bank I* and *II* survive, relations between local governments and the national bond market will be strained. Every unpopular project funded by bonds (*i.e.*, every unsuccessful project funded by bonds) is now a potential setting for a repeat performance of *Chemical Bank I* and *II*. Local government officials may be compelled to cry "*ultra vires*" after each failed project, unless the constitutional errors in *Chemical Bank I* and *II* are corrected.

The responsibilities of local government, especially their financial responsibilities, are quickly mounting as the "new federalism" continues to take hold. Local government units, including Seattle, simply cannot afford to have *Chemical Bank I* and *II* interfere with their access to the national bond market.

The result in *Chemical Bank I* and *II* would have been different if the Washington Supreme Court had adhered to this Court's interpretations of the Taking Clause and the Due Process Clause. This Court should grant the petition for a writ of certiorari in order to correct the substantial constitutional errors below.

Respectfully submitted,

DOUGLAS N. JEWETT
SEATTLE CITY ATTORNEY
Seattle Municipal Building
Seattle, Washington 98104
(206) 625-2402
City Attorney and Counsel For Amicus Curiae City of Seattle, Washington

CAMDEN M. HALL*
STELLMAN K. KEEHNEL
FOSTER, PEPPER & RIVIERA
34th Floor
1111 Third Avenue Building
Seattle, Washington 98101
(206) 447-4400
Counsel for Amicus Curiae City of Seattle, Washington

ELLEN DONOVAN
Suite 1855
1111 Third Avenue Building
Seattle, Washington 98101
(206) 447-4400
Of Counsel for Amicus Curiae City of Seattle, Washington

*Counsel of Record

February 25, 1985